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JOSEPH F. SPANIO, JR.
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NO. 89-957 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM 1989

TRANSPORTES DEL NORTE,
Petitioner,

v.

ANITA CLARK, et al.,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT
OF CERTIORARI**

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*To the Honorable Chief Justice and Justices of the
Supreme Court of the United States:*

Respondents Anita Clark, Gilberto Mayorga, Gloria Trevino, Richard H. Trejo, Linda Ramirez, Nilda Rangel, Cynthia Cortez, the Estate of Eulalia P. Mayorga, and the Estate of Emma Aurora Salazar Trejo respectfully oppose the Petition for Writ of Certiorari filed by Petitioner Transportes Del Norte.

JURISDICTIONAL RESPONSE

Petitioner alleges jurisdiction under 28 U.S.C. Section 1257(3).¹ Respondents challenge Petitioner's jurisdic-

1. 28 U.S.C. Section 1257 was amended in 1988; subsection (3) is now contained in subsection (a).

tional statement, and would respectfully show this Court that (1) no substantial, special or important federal constitutional question is presented, and (2) Petitioner failed to timely and properly raise the question it has presented to this Court.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Petitioner has reprinted the text of U.S. Const. Amend. XIV in its Petition at page 3. The text of Tex. R. App. P. 52(a) is reprinted at Appendix A of this Response.

STATEMENT OF THE CASE

This case is not of constitutional magnitude and presents no question of significance or importance except to the private parties involved. Rather, this is a routine wrongful death case in which Petitioner Transportes Del Norte presents to this Court a procedural "waiver" question. The decision of the Supreme Court of Texas regarding Petitioner's waiver of objection to certain trial testimony was correct and does not warrant review by this Court.

Prior to trial, the trial court overruled Petitioner's motion to exclude testimony of the investigating police officer on the basis that Respondents failed to disclose the witness' identity more than 30 days before trial. At trial, Petitioner failed to object to the testimony. Based on the jury's verdict, the trial court rendered judgment for Respondents in the amount of \$872,006 plus prejudgment interest for the deaths of the two decedents. The Texas court of appeals reversed on the discovery issue. On Respondents' application for writ of error, the Texas

Supreme Court reversed the court of appeals' judgment and remanded the case to that court for further review. Petitioner filed a skeletal motion for rehearing which was overruled without opinion.

SUMMARY OF ARGUMENT

1. The holding of the Texas Supreme Court that Petitioner failed to properly preserve its pretrial objection to testimony does not offend "due process." In fact, the holding that a litigant must re-urge a pretrial objection to evidence at the time the evidence is offered conforms to the general rule concerning motions *in limine*.

2. Petitioner improperly attempts to expand in this Court the constitutional argument it first made on motion for rehearing before the Texas Supreme Court. The "question" Petitioner now seeks to present appears to be a due process attack on waiver findings generally which jettisons the "retroactive application" argument made in its motion for rehearing.

3. The Court should assess double costs as a penalty for a frivolous appeal. The petition is clearly a delay tactic.

ARGUMENT

The Supreme Court of Texas decided this case on a procedural point of waiver, and remanded the case back to the court of appeals for further review of the remaining points of error raised by Petitioner and its co-defendant. 774 S.W.2d 644 (Tex. 1989). Texas' rule that an evidentiary point of error is waived if not raised by a trial objection is hardly unique, and does not involve a substantial federal or constitutional question. Moreover, Peti-

tioner's attempt to raise a federal or constitutional question is belated. Respondents first made the waiver argument in the court of appeals, and carried it forward to the Texas Supreme Court. Not once did Petitioner ever raise the argument that the waiver point had federal constitutional implications before it filed its skeletal motion for rehearing in the state supreme court. Even then, Petitioner attacked the waiver ruling on a different ground than that presented here.

A. NO SUBSTANTIAL FEDERAL OR CONSTITUTIONAL QUESTION

1. This Court has consistently required more than a showing that the state court decision involved adjudication of a federal right, privilege or immunity to warrant plenary intervention by this Court in the judicial process of a state. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). The issue presented must also be "special and important." *Id.*; Supreme Court Rule 17.2(c); compare *Zucht v. King*, 260 U.S. 174, 176, 177 (1922) (the issue presented must also be "substantial").

2. This case lacks substantiality or importance in terms of the constitutional issue Petitioner seeks to raise. Petitioner seeks to impart the imprecise impression that the Texas Supreme Court created or implemented a "new" procedural requirement for preserving a pretrial evidentiary ruling. That is not the case.

As the dissent to the Texas Supreme Court opinion noted, the court merely applied to discovery-based evidentiary pretrial rulings the previous long-standing rule governing motions *in limine*. 774 S.W.2d at 649 (Gonzalez, J., dissenting). Under Texas appellate rules, the

grant or denial of a motion *in limine* is not a ruling on the evidence and does not preserve error, because it is not a final ruling on the evidence. *Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 662 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Bifano v. Young*, 665 S.W.2d 536, 541 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

The court, then, did not create for this case a brand new procedural rule requiring a trial objection to objectionable evidence as a prerequisite to appellate review. Rather, the court relied on Tex. R. App. P. 52(a) (Appendix A), citing prior case law. See *Security Ins. Co. v. Nasser*, 755 S.W.2d 186, 194 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 178 (Tex. App.—Waco 1987, writ denied). Indeed, the policy and rule governing preservation of *in limine* objections applied by the Texas Supreme Court in this case is substantially the same as the federal rule. See e.g., *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985).

3. Petitioner erroneously argues that the Texas Supreme Court's waiver ruling prevented it from "obtaining a hearing and defending its substantive rights in the Supreme Court of Texas, for a conclusion of waiver means that there is no issue for the court to decide." Such an argument is ironic, in that the stated purpose of requiring a trial objection was to in fact give the trial court a final opportunity to address its pretrial ruling.

4. Petitioner has failed to show that the constitutional issue it raises was decided by the Texas Supreme Court,

or that its judgment could not have been rendered without deciding its Fourteenth Amendment challenge. The only point of error raised by Petitioner on motion for rehearing read:

The Honorable Supreme Court of Texas has erred in deciding to retroactively add a requirement of an additional at trial objection to Rule 215(5), Texas Rules of Civil Procedure, and Rule 52(a), Texas Rules of Appellate Procedure.

It then listed several short reasons in support of this contention. Only the final reason mentioned constitutional issues. It read *in toto*: "8. The Court's retroactive application of its new additional at trial objection requirement is in violation of the DUE PROCESS rights guaranteed to TDN under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 13 and 19 of the Texas Constitution." The Texas Supreme Court overruled the motion for rehearing without opinion.

B. ISSUE NOT TIMELY RAISED

1. From their first reply brief in the court of appeals, Respondents consistently made the argument that Petitioner waived its right to complain of the admission of evidence by failing to make a trial objection. Yet not until its motion for rehearing in the state supreme court did Petitioner intimate that such a finding would violate due process standards. *Compare Hanson v. Deckla*, 357 U.S. 235, 243-44 (1958), *rehearing denied*, 358 U.S. 858 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Louisville & Nashville R. Co. v. Woodford*, 234 U.S. 46 (1914). It had ample opportunity to raise the issue before the state supreme court ruled, and failed to do so.

2. Additionally, the broad constitutional attack Petitioner now raises is different from the "retroactive application" constitutional argument it urged on motion for rehearing to the Texas Supreme Court. In its motion for rehearing, quoted above, Petitioner posited, without argument or authorities, that the "retroactive" application of a rule requiring a trial objection to evidence was violative of the Fifth and Fourteenth Amendments to the United States Constitution. However, the issue Petitioner ambiguously² now presents to this Court is whether the Texas Supreme Court's waiver ruling itself constitutes an unconstitutional deprivation of property. This was never raised in the state courts below, and was therefore waived. *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981); *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980).

C. DAMAGES FOR DELAY

1. Section 1912 of Title 28 of the United States Code provides that "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double cost." This statute has been implemented in the Supreme Court Rules. Supreme Court Rules 49.2 & 50.7. In particular, Rule 49.2 provides that where a petition for a writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the Court may, in appropriate cases, adjudge to the respondent reasonable damages for its delay. *Compare* Fed. R. App. P. 38.

2. The petition filed with this Court is clearly frivolous. Indeed, Petitioner's co-defendant wisely chose not to join

2. The record does not present Petitioner's latest constitutional question with any degree of clarity. *Gilbert v. California*, 388 U.S. 263 (1967); *Mishkin v. New York*, 383 U.S. 502 (1966); *Kimbrough v. United States*, 364 U.S. 661 (1961).

in it. The petition presents no clear, concise question for review, but amounts, at most, to an academic essay on the Fourteenth Amendment. It is, for all intents and purposes, a tactic to delay final ruling by the Texas court of appeals. The Court should adjudge double costs and damages for delay against Petitioner.

CONCLUSION

This is not a "cert-worthy" case. No question of national importance is present here. The procedural waiver question presented by Petitioner Transportes Del Norte was correctly decided. No error occurred. The Texas Supreme Court's decision is based on adequate and independent state law procedural grounds. Nothing has been preserved for review by this Court.

This is not a case in which a state court has adopted or fashioned a procedural rule to discriminate against a federal law or right. Rather, the Texas Supreme Court applied long-standing appellate rules applicable in general to motions *in limine* to pretrial evidentiary discovery rulings.

This Court therefore lacks certiorari jurisdiction. Alternatively, the petition for writ of certiorari should be denied, or the judgment of the Supreme Court of Texas affirmed.

ON THESE PREMISES, Respondents respectfully pray that the Supreme Court of the United States deny the Petition for Writ of Certiorari of Transportes Del Norte, or alternatively affirm the judgment of the Supreme Court of Texas, and for all such further relief to which they are

entitled in law and in equity, including an assessment of damages for delay and double costs.

Dated: January 8, 1990.

Respectfully submitted,

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APPENDIX A**RULE 52. PRESERVATION OF
APPELLATE COMPLAINTS**

(a) *General Rule.* In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to ruling or orders of the trial court.

* * *

[Tex. R. App. P. 52(a)]